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ABSTRACT

The second round of litigation in the case of Debra P. v. Turlington has required the Federal courts to consider the question whether the Florida statute which requires public high school graduates to demonstrate the "ability to successfully apply basic skills to every day life situations" as measured by the State Student Assessment Test, Part II (SSAT-II), operates to deprive some students of diplomas in a manner so fundamentally unfair as to offend the due process and equal protection clauses of the Fourteenth Amendment to the Constitution. After background on the original litigation is presented, this paper describes a similar case from Tattnall County, Georgia, and Florida's evidence in the Debra P. case. Judge Carr's opinion is then briefly reviewed. Though the Eleventh Circuit Court of Appeals has not yet ruled, rulings in similar cases are described, and seem to uphold the use of tests like the SSAT-II. (BW)

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COMMON SENSE, COMMON LAW AND COMMON TESTS

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The second round of litigation in the case of Debra P. v. Turlington, 474 F.Supp. 244 (M.D. Fla. 1979), aff'd in part, rev'd in part and remanded, 644 F.2d 397 (5th Cir. 1981) (Unit B), has required the Federal courts to consider the question whether Section 232.246(1)(b), Florida Statutes, [which requires public high school graduates to demonstrate the "ability to successfully apply basic skills to every day life situtations" as measured by the State Student Assessment Test, Part II, (SSAT-II)], operates to deprive some students of diplomas in a manner so fundamentally unfair as to offend the due process and equal protection clauses of the Fourteenth Amendment to the U.S. Constitution. The whole enterprise of curricular evaluation is a perilous one for the judiciary. U.S. Supreme Court Justice Robert H. Jackson once noted that when reviewing educational policy "we act in these matters not by authority of our competence but by force of our commissions," Board of Education v. Barnette, 319 U.S. 624, 640 (1943). Apparently mindful of this fact, the

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court's common-sense analysis of the evidence of statewide instructional practices resulted in approval of the use of the test.

I.

Background

The case began as a class action filed on behalf of all present and future twelfth grade public school students in Florida who failed or who would fail the SSAT-II (Class A), all present and future twelfth grade black public school students in Florida who failed or would fail the test (Class B), and black students in the schools in the Tampa, Florida area who failed or would fail the test (Class C). The suit was a broad-based constitutional challenge to the SSAT-II, and included allegations that the test violated students' rights under Title VI of the Civil Rights Act of 1964 (42 U.S.C. Section 2000d), and under the Equal Educational Opportunities Act (20 U.S.C. Section 1703). The first trial and appeal determined, among other things, that the SSAT-II:

1. Adequately evaluates the skill objectives adopted by the State Board of Education, 474 F.Supp. at 261; 644 F.2d at 406;

2. Is reliable, 474 F.Supp. at 261 & n.23, 268; 644 F.2d at 406;

3. Has adequate construct validity, (id.);

4. Contains items which are not racially or ethnically biased, 474 F.Supp. at 262; 644 F.2d at 406;

5. Was free from error in the test development process which would render it constitutionally infirm, 474 F.Supp. at 261 & n. 23; 644 F.2d at 404;

6. Bears a rational relation to a valid state interest, 474 F.Supp. at 261; 644 F.2d at 406, and the State's interest in the diploma denial aspect of the program is substantial. 644 F.2d at 408;

7. May properly be used as a mechanism for remediation without violating the Constitution or federal statutes, 474 F.Supp. at 268; 644 F.2d at 408; and

8. May reasonably and constitutionally be applied to public schools only, over which the State of Florida has significant control, 474 F.Supp. at 263; 644 F.2d at 406.

The May, 1983, opinion of U.S. District Judge George C. Carr, arose out of the proceedings conducted after the case had been remanded by the court of appeals for further fact-finding. It is the first decision by Federal court which provides insight into what will be accepted as adequate proof that a statewide minimum competency test measures what is taught in the schools. Debra P. v. Turlington, 564 F.Supp. 177 (M.D. Fla. 1983), appeal pending.

The inquiry was made necessary under the 1981 ruling of the U.S. Court of Appeals for the Fifth Circuit (Unit B), [now the Court of Appeals for the Eleventh Circuit], which held that Florida had created an expectation in students that if they attended school as the law required, took and passed their required courses, they would receive diplomas.

Debra P. v. Turlington, 644 F.2d 144 (5th Cir. 1981) (Unit B). The appellate court affirmed Judge Carr's ruling that student expectations rose to the level of a property interest entitled to constitutional protection. This novel, but key holding, was the basis for the court's further equal protection and due process rulings. The equal protection ruling was that because Florida operated a dual school system until 1967 and the transition to a unitary system was not complete until 1971, the use of the SSAT-II to withhold diplomas before the 1982-83 school year would punish black students for deficiencies created by the dual school system in which they began their education. 644 F.2d at 407. Under due process analysis, the court determined that the legislative implementation schedule for the test violated due process by failing to provide students with adequate notice of the test as a graduation requirement. 644 F.2d at 404.

The more important appellate ruling for present purposes was the one the court itself characterized as the overriding issue on the appeal: Whether diplomas could be withheld on the basis of an examination which may cover matters not taught through the curriculum. 644 F.2d at 402 (emphasis by the court).

Starting with the premise that a state may not act arbitrarily, capriciously, or in a fundamentally unfair manner, the case was returned to Judge Carr because Florida had not presented evidence of efforts to make certain that the test "covered material actually studied in the classrooms

of the state," in order for him to address the question. 644 F.2d at 402. In the appellate court's view, the SSAT-II would be unfair if "the test covers materials not taught the student." Id. The court then used equal protection analysis to rule that a state cannot divide students into passers and failers on the basis of a test not rationally related to the purpose for which it was designed, and a test which is not a fair test of what is taught is not rationally related to a valid state interest. Id., at 406. Both theories converged on the question whether the SSAT-II is a fundamentally fair test of the instruction provided in Florida's schools. It seems to me the essence of the appellate court's holding is found in the following language from the opinion:

> "Just as a teacher in a particular class gives the final exam on what he or she has taught, so should the state give its final exam on what has been taught in its classrooms." Id., at 406.

This is, however, scant direction to the state to use in going about the task of assembling proof that what is tested is taught, and of little use to the trial judge in evaluating that proof. The court also told Judge Carr that if the material tested is taught, he should reconsider whether racially disproportionate results stem from vestiges of past segregation before approving the use of the test.

II.

The Task on Remand

a. The Tattnall County, Georgia Experience.

While Florida was the first state put to the test, the Tattnall County School District of Georgia was probably the pioneer in the area. Its school board had adopted the California Achievement Test (CAT) as an exit examination and required the students to score at the 9.0 level in mathematics and reading to receive a diploma. It was also challenged in court. Anderson v. Banks, 540 F.Supp. 761 (S.D. Ga. 1982), appeal pending. Shortly after the 1981 appellate ruling in Debra P., a curriculum study was conducted by Tattnall County using copies of CAT and a list of the materials used in the curriculum in grades one through eight and remedial materials used in high school. The district was able to show that each of the objectives measured on the test was taught in each of its basal series, as well as the remedial series. The district also conducted a test content match in which "examples of text content that closely paralleled the types of items used and the content measured" on the CAT were identified. Id., at 762. These studies were presented at a hearing, and principals and teachers from the district also testified that the materials on which the analyses were based were actually used in the curriculum of their schools. The Georgia trial judge, Judge Edenfield, made an important observation when he wrote in his decision,

"[T]here is no principled distinction to be made between an exit examination and any test which can be diploma-determinative, as, for example, an examination in a required course. The Court is of the opinion that whatever rules are fashioned for review of tests must be ones that the Court can apply to a challenge of any test which may affect receipt of a diploma." 540 F.Supp. at 765.

Judge Edenfield followed the long tradition of judicial deference to academic decisions made by school authorities when, in reviewing the proof offered, he did not require the district to prove that each child had been actually exposed to everything in the county curriculum. He understood that

"To require school officials to produce testimony that every teacher finished every lesson and assigned every problem in the curriculum would impose a paralyzing burden on school authorities and hamper them in constructing an academic program which they believe most effectively meets the needs of their students." 540 F.Supp. at 765-66.

Judge Edenfield found that the CAT was a fair test of the Tattnall County curriculum.

b. Florida's Evidence in Debra P.

The study prepared by Florida for presentation in evidence had five principal components, providing a network

of evidence contributing to an overall judgment that the schools do indeed teach what is tested. There was a teacher survey, a district survey, an on-site evaluation of the district survey responses by an outside team of visitors, a student survey and a report of remediation provided for members of the class of 1983 who failed the test.

The teacher survey was sent to 65,000 Florida teachers, and more than 47,000 responded to two questions on each of the twenty-four skills: Whether during the previous instructional year (1981-82) they provided instruction which specifically prepared students for each skill, and if so, whether the instruction was sufficient so that students should be able to demonstrate mastery of the skill. The description which was provided for each skill had been drawn from the test item specifications. Teachers were not asked to estimate whether students would actually answer the test item correctly, but whether in the teacher's judgment students received sufficient instruction so that if they expended reasonable effort they would be able to answer the question. The teacher survey focused on the most recent full year of instruction to require teachers to answer based on a specific class, and to further enhance the accuracy of their responses, and it was administered anonymously. The survey was not given only to math and language art teachers, because they might have perceived limited surveying as pressure to respond positively; it was broadly administered to create the warranted impression that the state was not trying to gather only positive responses.

The district survey consisted of several forms sent to each school district to learn about its instructional programs. It included a matrix for the districts to complete, showing the grades in which the majority of the district's students received instruction in each SSAT-II skill, and the grade at which most students would master the skill. Other forms asked for a description of any major program variations among the district's schools, a description of remedial programs for students likely to fail or who failed the SSAT-II, and a description of staff development activities related to SSAT-II skills. The most voluminous portion of the survey was an analysis of instructional materials used in the district for each skill, at each grade level, in both regular and remedial classes, including published textbooks and locally-developed materials, which provided specific preparation for the skills. The districts were instructed to focus their responses on what was actually taught, not just what was contained in the course syllabi. All district forms were prepared under the signature of the district superintendents, who had been told at regional meetings that their submissions would be independently evaluated by subsequent visits to assess their accuracy. There was a place at the foot of the instructional materials analysis forms for verification of the materials by site visitors, which was done to reinforce the perception that there would be an independent evaluation of the information submitted.

On-site visitations were then conducted to evaluate each district report. Three-member teams were used which were composed of an experienced program auditor from the Bureau of Curriculum Services of the State Department of Education and a language arts specialist and a mathematics specialist nominated by district superintendents to work in other districts. Larger districts were visited by more than one team, and no districts directly traded visitors. The teams went to a stratified random sample of elementary, middle/junior high and high schools in all districts to interview teachers, review instructional materials and generally determine whether the district reports were accurate. Extensive training materials for the visitors were constructed to assure accuracy, honesty and objectivity in the visits. Worksheets for the visitors to use were prepared to focus their investigations. The teams met jointly to prepare a final report on their findings but provisions were made for minority reports, and all team members signed the final report. Team members were informed that the district superintendent could respond to any criticism.

During their visits to high schools, team members selected at random an eleventh grade English or social studies class to administer a student survey, which was answered anonymously. This provided a purposeful sample of approximately 3,200 students. The survey contained four example test questions for each of the skills that are tested, which had been prepared

from the test items specifications. The correct answers for each sample question students are given were marked. Students were asked whether they recalled being taught in school how to answer test questions of the type displayed. A specific script was used in administration to prevent bias in survey administration. Social science or English classes were selected so there would be no pressure perceived to give positive responses, which might have occurred in a math class.

The state also introduced evidence in the form of summaries of reports completed by high school principals which described the remedial assistance provided after each administration of the test to those students who anticipated graduating in May, 1983, but had failed the test when they took it in April, 1981, as tenth graders. All this constituted a rather impressive array of evidence.

Three experts testified on behalf of the state, Dr. W. James Popham, Dr. Donald J. Henderson, and Dr. Robert Gagne. All were satisfied, after having reviewed the evidence, that the districts were offering adequate instruction. Indeed, one of plaintiffs' witnesses, Dr. Robert Calfee, conceded the instructional validity of the communications portion of the SSAT-II during his testimony.

c. Judge Carr's Opinion.

In the opinion upholding the SSAT-II, Judge Carr noted that the concept of minimum competency testing is highly controversial, has polarized the educational community, and that he had been called upon to settle not only a legal

argument, but a professional dispute. Under the Constitution, however, his duty was to determine whether Florida's program met basic standards of fairness. The fact that plaintiffs believed they could have fashioned a better program than the one adopted by the State would not invalidate the program.

Judge Carr took a practical view of the nature of the evidence that could be gathered. His analysis was influenced by the comments of Judge Edenfield in the Anderson case, for Judge Carr noted that without a videotape of each student's school career we cannot know the instructional experiences of each child. 565 F.Supp. at 184. What appears to have most impressed the judge was that the districts reported that the skills were included in their curriculum, these reports were independently verified, and the results of the teacher survey showed that a substantial number of teachers stated they adhered to the curriculum by including the skills in their course of instruction. It was also significant to Judge Carr that Florida's students are provided five opportunities to pass the test between the tenth and twelfth grade, and if they fail, the state offers remedial help. Evidence was introduced showing that between the implementation of the testing program and the time of the remand hearing, the state provided more than $127,000,000, to help 1,700,000 students throughout all grades acquire the minimum skills which are part of Florida's testing program for grades 3, 5, 8, and 11. Dr. Gagne had testified that students who did not pass in the tenth grade could learn the necessary skills prior to

graduation because suitable remedial instruction was available. After determining that the skills are included in the official curriculum and that a majority of teachers recognize them as something they should teach, to Judge Carr

> "the only logical inferrence is that teachers are doing the job they are paid to do and are teaching these skills. Accord, Anderson v. Banks, 540 F.Supp. 761 (S.D. Ga. 1982). It strains credibility to hypothesize that teachers, especially remedial teachers, are uniformly avoiding their responsibilities at the expense of their pupils." 564 F.Supp. at 186.

The state's evidence convinced the judge that the requirements of the testing program are not hollow words in a statute book, but a driving force in all of Florida's public schools.

Both Judge Edenfield and Judge Carr, adopted pragmatic approaches in evaluating proof that the skills tested are actually taught. Neither judge has required the district or state to show that each child who failed the test was actually exposed to instruction in all skills. Because the teachers recognized that they should include these objectives in their instruction, Judge Carr believed he had an adequate basis for inferring that appropriate instruction does take place, especially in view of the further safeguard of appropriate remedial instruction for students who do not pass the test initially.

d. Awaiting Word From the Court of Appeals.

Neither of these cases have yet been addressed by the Eleventh Circuit Court of Appeals. It may be significant, however, that the Eleventh Circuit recently rejected a challenge to a policy of a Tuscaloosa, Alabama Board of Education which required that elementary school students who did not read at required minimum reading levels for their grade be retained. Bester v. Tuscaloosa City Board of Education, 722 F.2d 1514 (11th Cir. 1984). After the adoption of the policy, 5.8 percent of white children and 23.6 percent of black children were retained in grade. There was no claim made that the board policy had resulted from racial considerations; no such claims had been made in Debra P. or Anderson, either. The Court of Appeals rejected the argument that by accepting unsatisfactory work as a basis for promotion in the past, the school board could not shift to a promotion standard requiring satisfactory work if the shift affected black students more than white students. In the Tuscaloosa case, the court did not find that black students had a legally protected property interest in being promoted based on unsatisfactory work. If they had the expectation that they would continue to be promoted for substandard performance, that expectation was unreasonable. Although there may be a distinction between the judicial protection that will be granted to student expectations for promotion and expectations for graduation, it is significant that the court has found that the meaning of satisfactory work need not remain constantly fixed at a level that is objectively academically unsatisfactory.

Given Florida's evidence demonstrating that the skills tested are not only part of the schools' curriculum, but are actually taught, Florida students have a reasonable opportunity to acquire the skills. Indeed, under the Florida program a student may reject the certificate of completion available to students who accumulate the necessary number of credits but who failed to pass the test, and they may return to their high school, without cost, for a thirteenth year of instruction focusing on the skills required by the minimum competency program; thereafter, if the student still does not satisfy the standards, further training, without cost to the student, is available in district adult education programs without any time limitation. See, Sections 228.072(4),(5), 232.246(4), 236.0815 and 236.088, Fla. Stat. (1983).

The facts found by the trial judge should control the court of appeals' treatment of the present decision, not an ultimate disproportion in passing percentages for racial or ethnic groups. Otherwise, the courts will sanction the absurd idea that students have a property interest in credentials evidencing skills they do not possess. Such a rule says that it is more important not to disappoint student expectations than to provide students with those skills which have been judged by school authorities to constitute the minimally acceptable level of attainment for a high school diploma. It also has the perverse effect of treating additional education to acquire the skills as punishment. The goal should be

universal education, not issuance of credentials which become meaningless by universal distribution.

The Court of Appeals for the Seventh Circuit recognized this when it upheld the authority of the Peoria, Illinois School District to require special education students to pass the same minimum competency test required of regular students in order to receive a diploma. The court found the test had been implemented without sufficient time for eleven special education students to have been exposed to the material tested. The students had been out of school for two years by the time the case was decided. The court ordered that those eleven students be granted diplomas, but put other students on notice that in the future, handicapped students who proved they had not been exposed to the material would be entitled to additional special classes, but not to diplomas. Brookhart v. Illinois Board of Education, 697 F.2d 179, 188 (7th Cir. 1983). Similarly, the New York state courts have held that handicapped students with functional mental deficits have no property right to diplomas, credentials which certify that the "recipient possess all the knowledge and skills expected of individuals who have been exposed to a rigorous academic discipline." Board of Education v. Ambach, 90 A.D.2d 227, 458 N.Y.S.2d 680, 686 (1982), aff'd., 60 N.Y.2d 758, 469 N.Y.S.2d 669 (1983), cert. denied, ___U.S.___,52 L.W. 3687 (March 19, 1984).

The holdings of these courts are to be applauded as triumphs of common sense.

I hope, and believe, that that triumph will continue.